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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

Bobby R. Burchfield, Esquire
Michael A. Dawson, Esquire
Covington & Burling
1201 Pennsylvania Avenue, NW
Washington, DC 20004

November 16, 1998

RE: MUR 4378
National Republican Senatorial
Committee
Stan Huckaby, as treasurer

Dear Mr. Burchfield and Mr. Dawson:

Based upon a complaint received by the Federal Election Commission on May 31, 1996, and upon information supplied by your clients, the Commission, on June 17, 1997, found that there was reason to believe the National Republican Senatorial Committee and Stan Huckaby, as treasurer, violated 2 U.S.C. §§ 441a(f), 441b, and 434(b) and 11 C.F.R. § 102.5, and instituted an investigation of this matter.

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that violations have occurred.

The Commission may or may not approve the General Counsel's recommendation. Submitted for your review is a brief stating the positions of the General Counsel on the legal and factual issues of the case. Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your positions on the issues and replying to the brief of the General Counsel. (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible.) The General Counsel's brief and any brief which you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe violation have occurred.

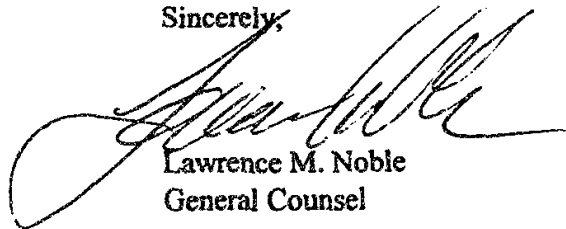
If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time. All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

Bobby R. Burchfield, Esquire
Michael A. Dawson, Esquire
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A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement.

Should you have any questions, please contact Anne A. Weissenborn, the senior attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Lawrence M. Noble", written over the typed name and title.

Lawrence M. Noble
General Counsel

Enclosure
Brief

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

National Republican Senatorial Committee
Stan Huckaby, as treasurer

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MUR 4378

GENERAL COUNSEL'S BRIEF

I. STATEMENT OF THE CASE

On June 17, 1997 the Commission found reason to believe that the National Republican Senatorial Committee and Stan Huckaby, ("the NRSC"), violated 2 U.S.C. §§ 441a(f), 441b, and 434(b) and 11 C.F.R. § 102.5(a) as a result of expenditures made by the NRSC in 1996 for media advertisements critical of U.S. Senator Max Baucus. The Office of the General Counsel has conducted an investigation pursuant to 2 U.S.C. § 437g(a)(2). This Brief presents the results of that investigation and sets out the intention of this Office to recommend that the Commission find probable cause to believe that the NRSC violated provisions of the Federal Election Campaign Act of 1971, as amended, ("the Act"), and of the Commission's regulations.

II. FACTUAL AND LEGAL ANALYSIS

A. The Law

2 U.S.C. § 441a(a)(1)(B) and (a)(2)(B) limit to \$20,000 per calendar year the amount which any person may contribute to a political committee established by a national political party, and to \$15,000 per calendar year the amount which a multi-candidate committee may contribute to a national party committee. Generally, 2 U.S.C. § 441a(a)(2)(A) limits to \$5,000

the amount which any multi-candidate committee may contribute per election to a candidate and his or her authorized committee. 2 U.S.C. § 441a(f) prohibits political committees from accepting contributions or making expenditures in violation of the statutory limitations. 2 U.S.C. § 441b prohibits political committees from making or accepting contributions which contain corporate or labor union funds.

2 U.S.C. §§ 431(8)(A)(i) and 11 C.F.R. § 100.7(a)(1) define "contribution" as including "any gift, subscription, loan, advance, . . . or anything of value made by any person for the purpose of influencing any election for Federal office" 2 U.S.C. § 431(9)(A)(i) and 11 C.F.R. § 100.8(a)(1) define "expenditure" as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office" 2 U.S.C. § 431(11) and 11 C.F.R. § 100.10 define "person" as "an individual, partnership, committee, association, labor organization, or any other organization or group of persons" "Anything of value" includes in-kind contributions. 11 C.F.R. §§ 100.7(a)(1)(iii)(A) and 100.8(a)(1)(iv)(A).

An exception to the general contribution limitations outlined above is found at 2 U.S.C. § 441a(h) which permits the Republican and Democratic Senatorial Campaign Committees, or a national party committee, or any combination thereof, to contribute up to \$17,500 to a candidate for nomination or election to the United States Senate during the election year in which that individual is a candidate.

Pursuant to 2 U.S.C. § 441a(d)(3)(A), the national committee of a political party and the state committees of the same party may each also make expenditures "in connection with" the general election campaign of candidates who are affiliated with such party for election to the

United States Senate which do not exceed the greater of 2 cents multiplied by the voting age population of the state involved, or \$20,000. The limits at Section 441a(d) are adjusted annually for inflation. See 2 U.S.C. § 441a(c). As noted by the Supreme Court in Colorado Republican Federal Campaign Committee v. FEC, 116 S.Ct. 2309, 2315 (1996) ("Colorado Republicans"), this special provision for party committee expenditures (which the Court termed the "Party Expenditure Provision") is an exception to the rules limiting contributions in federal elections which are set out at 2 U.S.C. § 441a. "[B]ut for [Section 441a(d)], these expenditures would be covered by the contribution limitations stated in [Section 441a(a)(1) and (2)]." H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 59 (1976).

Thus, the Republican and Democratic Senate campaign committees, in conjunction with the national committees of their respective parties, are entitled to make aggregate direct and in-kind contributions to candidates for the U.S. Senate totaling as much as \$17,500 and also to make coordinated expenditures in connection with the campaigns of the same candidates up to their Section 441a(d) limitations. However, once both of these limitations are exhausted, any additional expenditures made in coordination with a candidate would be no different than any other excessive contributions made by the Senate campaign committee and would thus result in a violation of 2 U.S.C. § 441a(h).¹

¹ The Factual and Legal Analysis sent to Respondents in this matter stated: "Party committees which exceed the Section 441a(d) limitations violate 2 U.S.C. § 441a(f)." The Commission found reason to believe that the NRSC violated 2 U.S.C. § 441a(f). Since this determination and approval of the Factual and Legal Analysis it has been determined that the better approach is to find that national party committees which go beyond their Section 441a(d) limitations with regard to campaigns for the U.S. Senate violate the contribution limitations established at 2 U.S.C. § 441a(h).

In June, 1996, the Supreme Court in Colorado Republicans rejected the Commission's conclusion at 11 C.F.R. § 110.7(a)(5) that party committees, by virtue of their close relationship to candidates, were incapable of making independent expenditures and that, as a result, all expenditures made by such committees in support of a candidate should be deemed "coordinated" with that candidate. Rather, the Court held that political parties can make expenditures independently of candidates which are not subject to the limitations of 2 U.S.C. § 441a(d). 116 S.Ct at 2315-2316.² Actual coordination is now an essential element of any determination that party expenditures are subject to the limitations of Section 441a(d).

Definitions of "coordination" are found only indirectly in the Act and in the Commission's regulations. 2 U.S.C. § 441a(a)(7)(B)(i) states that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate" See Buckley v. Valeo, 424 U.S. 1, 46 (1976). 2 U.S.C. § 431(17) and 11 C.F.R. § 109.1(a) and (b)(4) each address what constitutes coordination in the context of defining an expenditure as not independent when it is "made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate or any agent or authorized committee of the candidate." Section 109.1(b)(4) then further defines

² Colorado Republicans addressed certain expenditures for advertisements in opposition to the record of then-U.S. Senator Timothy Wirth made by the Colorado Republican Party prior to the primary elections in that state in 1988. The Supreme Court found the advertising campaign undertaken by the party committee to have been independent. 116 S.Ct. at 2315. In light of this independence, the expenditures involved were found not to have been subject to Section 441a(d) limitations. (See further discussion below.)

the concept of non-independent, and therefore coordinated, expenditures related to communications as follows:

“Made with the cooperation or with the consent of . . .

(I) Means any arrangement, coordination, or direction by the candidate or his or her agent prior to the publication, distribution, display, or broadcast of the communication. An expenditure will be presumed to be so made when it is -

(A) Based on information about the candidate’s plans, projects, or needs provided to the expending person by the candidate, or by the candidate’s agents, with a view toward having an expenditure made; or

(B) Made by or through any person who is, or has been, authorized to raise or expend funds, who is, or has been, an officer of an authorized committee, or who is, or has been, receiving any form of compensation or reimbursement from the candidate, the candidate’s committee or agent.

In Colorado Republicans, the Supreme Court addressed the issue of coordination in a case involving expenditures by a state party committee for an advertising campaign. The Court found statements submitted as evidence to have been insufficient to establish coordination between the state party committee and a candidate because they were “general descriptions of party practice. They do not refer to the advertising campaign at issue here or to its preparation.” 116 S.Ct at 2315. The Court then found the subject advertising campaign to have been independent, because the statements cited as evidence of coordination did not “conflict with, or cast significant doubt upon, the uncontroverted direct evidence” that the campaign at issue had been “developed . . . independently and not pursuant to any general or particular understanding with a candidate.” Id.

Consequently, the Court found the expenditures involved not to have been subject to Section 441a(d) limitations.

The Supreme Court left unanswered in Colorado Republicans the question of whether party expenditures which are coordinated with candidates can be constitutionally limited by Section 441a(d), and remanded the case to the lower courts to address this particular issue. 116 S.Ct. at 2319. Thus, absent further judicial interpretation in this or another context, Section 441a(d) limitations are applicable to party committee expenditures which have been coordinated with a candidate. Consistent with the law outlined above, such "coordinated expenditures" constitute in-kind contributions by the party committee which are "accepted by" the candidate's committee. Thus, when such coordinated expenditures by a Senate campaign committee, alone or in combination with direct contributions to a candidate made pursuant to Section 441a(h), exceed the combined limitations of Sections 441a(h) and 441a(d), violations of 2 U.S.C. § 441a(h) by the Senate campaign committee would result.

In addition to the issue of coordination, an important element in determining whether the limitations at 2 U.S.C. § 441a(d) and/or 2 U.S.C. § 441a(h) apply to particular expenditures is the content of the Senate campaign committee messages being addressed. "Independent expenditures," which may be made without limit, include only expenditures which "expressly advocat[e] the election or defeat of a clearly identified candidate." 2 U.S.C. § 431(17). The Act does not, however, impose the same express advocacy requirement upon the party expenditures permitted by, but also limited by, 2 U.S.C. § 441a(d) or upon in-kind contributions limited by 2 U.S.C. § 441a(a), or, in the case of Senate campaign committees, by 2 U.S.C. § 441a(h).

As is stated above, 2 U.S.C. § 441a(d) permits limited expenditures to be made by party committees "in connection with general election campaign[s] of candidates for federal office," including expenditures for communications such as media advertising. The Supreme Court in Colorado Republicans did not address the appropriate measure of the content of such communications. However, the Court of Appeals in its earlier decision in FEC v. Colorado Republican Federal Campaign Committee, 59 F.3d 1015 (10th Cir. 1995), had reversed the District Court's finding that, in order for expenditures for advertisements to have been made "in connection with" a general election and thus limited by 2 U.S.C. § 441a(d), the advertisements had to constitute "express advocacy." Rather, the Court of Appeals expressly deferred to the Commission's long-standing "construction of § 441a(d) as regulating political committee expenditures depicting a clearly identified candidate and conveying an electioneering message" 59 F. 3d at 1022, citing Advisory Opinion 1984-15.

2 U.S.C § 431(18) defines "clearly identified" as meaning "(A) the name of the candidate involved appears; (B) a photograph or drawing of the candidate appears; or (C) the identity of the candidate is apparent by unambiguous reference." 11 C.F.R. § 100.17 amplifies the statute by defining "clearly identified" as meaning

the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as 'the President,' 'your Congressman,' or 'the incumbent,' or through an unambiguous reference to his or her status as a candidate such as 'the Democratic presidential nominee' or 'the Republican candidate for the Senate in the State of Georgia'.

With regard to "electioneering messages," the Court of Appeals in Colorado Republicans addressed the standard for the content of such communications. The court quoted at length from Advisory Opinion 1984-15 in which the Commission found that the advertisements there at issue

constituted electioneering messages because they had as "their clear import and purpose . . . to diminish support for any Democratic Party presidential nominee and to garner support for whoever may be the eventual Republican Party nominee." 59 F.3d at 1023. The Court of Appeals also cited Advisory Opinion 1985-14 in which the Commission addressed, *inter alia*, a sample mailer to be paid for by the Democratic Congressional Campaign Committee ("DCCC"); the Commission in that opinion found that expenditures for the proposed mailer, which was to be critical of Republicans vis a vis the "coastal environment," would be subject to Section 441a(d) limitations because the mailer would name a specific member of Congress and be distributed in part or all of that member's district.³ The court noted the Commission's citation in AO 1985-14 of U.S. v. United Auto Workers, 352 U.S. 567, 587 (1957), in which the Supreme Court defined "electioneering message" as "statements 'designed to urge the public to elect a certain candidate or party'." *Id.* The court then concluded that the Colorado Republican Party's 1988 advertisements in opposition to then Senator Timothy Wirth's record "unquestionably contained an electioneering message." According to the court, these advertisements had left "the reader (or listener) with the impression that the Republican Party sought to 'diminish' public support for Wirth and 'garner support' for the unnamed Republican nominee." *Id.*

The Tenth Circuit thus found the Commission's standard of "electioneering message" for Section 441a(d) communication-related expenditures, and its definitions thereof, to have been

³ In Advisory Opinion 1985-14, the Commission also addressed two proposed scripts for radio and television advertisements. The Commission concluded that the advertisements which cited "Republicans in Congress" would not be subject to Section 441a(d), regardless of whether they also included "Vote Democratic" or another "electioneering message." With regard to the advertisements which cited "your Republican Congressman" and included the words "Vote Democratic," the Commission was unable to agree.

reasonable, and was willing to defer to the Commission's judgment in this regard. The Supreme Court in Colorado Republicans vacated the Court of Appeals' opinion on other grounds; however, on the issue of "electioneering message" as the standard for content, the Court was silent.

Should a state party committee elect not to make directly the expenditures permitted by Section 441a(d), it may assign its expenditure limitation to a national committee, thereby designating that committee as its agent for purposes of making coordinated party expenditures. FEC v. Democratic Senatorial Campaign Committee, 484 U.S. 27 (1981). When a state party committee follows this course with respect to a particular election, its Section 441a(d) limitation is effectively transferred to its agent, leaving the state party committee able to make only general election contributions to its nominee within the 2 U.S.C. § 441a(a) limitations.

In situations in which a Senate campaign committee, in conjunction with the national committee of its respective party, has used its entire Section 441a(d) limitation with regard to a particular candidate, questions arise as to the standard to be applied to the content of communications purchased with Senate campaign committee funds in coordination with that candidate when determining whether and by how much additional coordinated expenditures by the same committee would place it in violation of 2 U.S.C. § 441a(h). As stated above, the Act's definitions of both "contribution" and "expenditure" employ the phrase "for purposes of influencing any election for Federal office" Thus, payments to, or in cooperation with, a candidate and his or her authorized committee need only be made "for purposes of influencing" a federal election in order to be subject to the limitations at 2 U.S.C. § 441a(a). The Commission has addressed the phrase "for purposes of influencing" on many occasions, including in the

context of so-called "issue advertising." For example, in Advisory Opinion 1983-12 the Commission found that the payments for television messages to be aired by a political committee would be "expenditures" because the messages' timing and their content were "designed to influence the viewers' choices in an election"

In the context of 2 U.S.C. § 441a(d) expenditures, however, the Commission has applied a "clearly identified candidate/electioneering message" test. The most significant difference between these two tests for the contents of communications has been that, for purposes of the Section 441a(d) limitations, an "electioneering message" has had to be accompanied by a reference to a "clearly identified candidate," while Section 441a(a) expenditures/in-kind contributions for communications made "for purposes of influencing a federal election" have not been so limited.

As a result of the Supreme Court's requirement in Colorado Republicans of actual coordination before party expenditures may be deemed subject to Section 441a(d) limitations, there has come about a convergence, with respect to coordination, of the standards for coordinated party expenditures limited by Section 441a(d) and for in-kind contributions limited by Section 441a(a). Because of this convergence, excessive Section 441a(d) expenditures are now, as stated above, considered Section 441a(a) in-kind contributions and are thus subject to the Section 441a(a) limitations. By extension, the same holds true for a Senate campaign committee's excessive coordinated expenditures which would become subject to the Section 441a(h) limitation.

In light of the new, common standard of actual coordination with regard to Section 441a(a) in-kind contributions and to Section 441a(d) party expenditures, the Commission has

decided to apply common standards to the contents of party committee communications financed by these two categories of expenditures. Hence, in the context of party committee expenditures for communications, the standard of "for purposes of influencing a federal election," as this phrase defines Section 441a(a) "contributions" and "expenditures," will encompass the same elements as those required for a communication financed pursuant to Section 441a(d), i.e., both an electioneering message and a clearly identified candidate.⁴ Again by extension, Senate committee expenditures limited by Section 441a(h) will be subject to analysis of the same elements.

11 C.F.R. § 102.5(a)(1) requires that political committees which make expenditures "in connection with both federal and non-federal elections" either establish separate federal and non-federal accounts or set up a single account "which receives only contributions subject to the

⁴ As stated, this change in the standard of content is intended to apply only to party committees and only to the communications financed by such committees. In the first regard, separate treatment of party committees is justified in light of the special considerations given such committees in the past. For example, Section 441a(d) was intended by Congress to provide party committees with additional possibilities for assisting specific candidates, possibilities not available to other political committees. The standard for the content of Section 441a(d) party communications, with its "clearly identified candidate" and "electioneering message" components, grew in turn out of the need to distinguish between party communications which meet the Section 441a(d) criteria, and are thus limited, allocable to specific candidates and 100% federal, and another special category of party expenditures - those for generic communications which, although allocable between a party committee's federal and non-federal accounts, are unlimited in amount and not allocable between or among specific candidates. See 11 C.F.R. §§ 106.1 and 106.5 as discussed below.

Expenditures for non-communication purposes, e.g., for equipment, travel, telephone charges, etc., are not affected by this change. In these instances, "for purposes of influencing a federal election" will continue not to require a "clearly identified candidate."

limitations and prohibitions of the [Federal Election Campaign] Act." If separate federal and non-federal accounts are established, all expenditures made in connection with federal elections must be made from the federal account.

Pursuant to 11 C.F.R. § 106.1(e), party committees that make disbursements for certain specific categories of activities which are undertaken in connection with both federal and non-federal elections, but which are not coordinated with a candidate and thus are not attributable, must allocate those expenses in accordance with the rules at 11 C.F.R. § 106.5. These categories include administrative expenses, fundraising costs, the costs of certain activities which are exempt from the definitions of "contribution" and "expenditure," and the costs of generic voter drives. 11 C.F.R. § 106.5(a)(2)(i-iv). "Administrative expenses" include "rent, utilities, office supplies, and salaries, except for such expenses directly attributable to a clearly identified candidate." 11 C.F.R. § 106.5(a)(2)(i). "Generic voter drives" include activities which "urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate." 11 C.F.R. § 106.5(a)(2)(iv).

The Senate and House campaign committees of national parties must allocate administrative expenses and the costs of generic voter drives according to the funds expended method established at 11 C.F.R. § 106.5(c)(1). A minimum of 65% of these costs must be allocated each year to the federal account; if the committee's own calculation results in a higher percentage, the latter figure must be used. 11 C.F.R. § 106.5(c)(1) and (2).

B. Background and Overview of Investigation

The 1996 Republican primary election in Montana for the U.S. Senate seat held by Senator Max Baucus took place on June 4, 1996. The NRSC in April, May and June, 1996,

made a series of expenditures for radio and television advertisements placed on stations serving parts of Montana, and reported them as "administrative/voter drive" expenditures allocable between federal and non-federal shares on a 65% / 35% basis. These advertisements, which ran prior to and after the primary election, were critical of the record of Senator Baucus who was a candidate for re-election that year. In one particular instance cited in the complaint, a "controversial advertising campaign report" had been placed on file with a station broadcasting a particular NRSC advertisement; the report stated that the advertisement opposed Senator Baucus' re-election. Another advertisement addressed in the complaint explicitly supported the candidacy of Dennis Rehberg, the eventual Republican nominee for the Senate; in this instance at least one station had broadcast the advertisement with the disclaimer "Paid for by the National Republican Senatorial Committee." The NRSC had not reported expenditures for this pro-Rehberg advertisement.

The goal of the investigation in this matter has been to determine the number and content of all of the NRSC's advertisements addressing Senator Baucus' record which were broadcast into Montana during the time period cited in the complaint, and whether or not the NRSC coordinated these advertisements with the Rehberg campaign. Discovery has focused upon obtaining copies of all scripts, upon the costs of this advertising, and upon the dates and content of contacts between Dennis Rehberg and/or representatives of his campaign and NRSC personnel.

At the time that the NRSC was notified of the Commission's findings of reason to believe, that committee was also served with a Subpoena for Deposition, Subpoena for Documents and Order to Answer Written Questions. The NRSC responded to the Subpoena and

Order and designated Jo Anne B. Barnhart, who served as political director in 1996, to appear for deposition as the NRSC's representative. Dennis Rehberg and Ladonna Y. Lee, a consultant for the Rehberg committee, were also deposed. In addition, Montanans for Rehberg and Dennis Rehberg responded to a Commission Subpoena for Documents and Order to Answer Written Questions.

According to the D Indices summarizing contributions and expenditures made by the NRSC and by the Republican National Committee ("RNC") in 1996, the NRSC contributed \$17,500 to the Rehberg campaign but reported no Section 441a(d) expenditures on behalf of Dennis Rehberg; however, the RNC reported a total of \$122,000 in Section 441a(d) expenditures on behalf of Mr. Rehberg's campaign, or almost twice the statutory limitation of \$61,820 placed upon party expenditures on behalf of Senate candidates in Montana in 1996. It thus appears that the Republican Party of Montana assigned its 1996 Section 441a(d) limitation with regard to the Montana Senate campaign to the RNC, and that the RNC utilized virtually all of the combined limitation. Thus, the NRSC would have had virtually no Section 441a(d) expenditure possibilities available.

C. Facts Developed

In response to the Commission's subpoena, Montanans for Rehberg produced an NRSC press release entitled "NRSC Gathering Video, Audio Footage of Clinton Tax Comments" which was issued by the NRSC on October 19, 1995. This release stated that the NRSC was at that time "gathering audio and video footage of the President's 'raised taxes too much' speech in Houston" to use during the 1996 Senate campaigns, and that one of the incumbent Senators on a possible target list was "Senator Max Baucus/MT." The Rehberg campaign also produced seven

additional NRSC press releases dated between April 16 and June 24, 1996, which announced placement of specific radio and television advertisements on stations serving Montana. Each of these NRSC press releases included a script critical of Senator Baucus' position on an issue such as term limits, Senate salary increases or a balanced budget. Three of these press releases/scripts are the same as those attached to the complaint.

a. Scripts

i. April 16, 1996

The script for the NRSC-financed April 16, 1996 radio advertisement aired in Montana, as quoted in the news release dated that same day, was as follows:

Liberal Max Baucus voted to raise his own pay, then voted to raise our taxes. He was wrong. While working families are having a tough time making ends meet here in Montana, Max Baucus is back in Washington giving himself a big pay raise, then voting to raise our taxes.

Max Baucus increased his pay by more than \$23,000, then increased our taxes by more than \$2,600 per family. That's an outrage. Pay raises . . . higher taxes. That's not Montana - but it is Max Baucus.

Soon the Senate will vote on term limits - and the people of Montana support it. But not Max Baucus. In fact, he's already opposed term limits. It's just what you would expect from a Senator who's been in Washington for twenty-one long, liberal years.

Call liberal Max Baucus. Tell him he was wrong to vote himself a big pay raise, then vote to raise our taxes. Tell him it's time to vote for term limits.

Paid for by the National Republican Senatorial Committee

ii. April 25, 1996

The sixty-second NRSC radio spot which began airing on April 25, 1996, read:

You already know that liberal Max Baucus voted to raise his own pay by \$23,000 then voted to raise your taxes by more than \$2,600 per family.

But did you know that in the 21 long liberal years that Baucus has been in Washington, our debt skyrocketed to \$5 trillion.

It's a fact.

And still liberal Max Baucus refuses to consistently vote for a real balanced budget.

Instead, he's voted to spend billions more on wasteful government spending.

That's right. Billions more.

Liberal Max Baucus even voted to spend our taxdollars to pay for an alpine slide in Puerto Rico and a casino in Connecticut.

That's not Montana, But it is Max Baucus.

Call liberal Max Baucus at (800) 332-6106. Tell him to stop wasting our hard earned money. Tell him to vote for Congress' balanced budget plan.

Paid for by the National Republican Senatorial Committee.

iii. May 8, 1996

Another radio spot began on May 8, 1996. The script for this spot, as included in the press release of the same day, read:

The top movie is "Godfather Part II.

"Streaking" becomes a national fad.

Max Baucus goes to Washington, and our national debt is \$484 billion.

A lot's changed in 21 years - for example, Max Baucus' salary has more than tripled, from \$42,000 to \$133,000 a year. And the national debt has skyrocketed to \$5 trillion.

What have we gotten from Baucus' 21 long liberal years? More taxes and more debt. Liberal Baucus voted for five of the largest tax increases

in American history. In one vote alone, he increased taxes on Montana families by \$2,600 a year.

Baucus even voted to raise taxes on Social Security, small businesses, and gasoline.

Call liberal Max Baucus. Tell him to balance the budget. Tell him he was wrong to raise taxes and spend us into debt. Tell him to vote for the majority's plan to balance the budget.

Paid for by the National Republican Senatorial Committee

iv. May 12, 1996

May 12, 1996 brought a television advertisement funded by the NRSC which included the following video and audio segments:

<u>Video</u>	<u>Audio</u>
GRAPHICS: 1974	1974
Baucus still	Liberal Max Baucus goes to Washington.
GRAPHICS: Your share of national debt - \$2300.	Your share of the national debt - \$2300.
	22 long liberal years later. Government spending explodes.
GRAPHICS: 1996 Headline on Spending.	Baucus votes for five of the biggest tax increases in history.
GRAPHICS: Baucus votes for five of the biggest tax increases in American history.	
GRAPHICS: Your share of national debt - \$19,000.	Your share of the national debt -- \$19,000.
MOVING UPWARD ARROW AGAINST GRAPH LABELED BAUCUS SALARY	What else is up?

Arrow ends at \$133,000

Baucus's salary, It's tripled
to \$133,000.

Baucus pix.

GRAPHICS: Call Max Baucus/Phone
#??/Balance the Budget

We need a balanced budget.

Call liberal Max Baucus
and tell him to support the
majority's balanced budget
plan.

Disclaimer

v. May 24, 1996

Yet another NRSC 30-second television advertisement, which began on May 24, 1996,
aired in five markets in Montana. Its script read:

By one vote, the Senate passed the largest tax increase in history. That
one vote - Max Baucus.

He voted for more taxes on Social Security, gasoline and family farms.

It's no surprise.

For twenty-two long liberal years, Baucus has spent our money and
raised our taxes. He's the sixth biggest spender in the Senate.

Max Baucus - definitely a liberal.

Call. Tell Baucus to vote for the majority's plan to balance the budget.

vi. May 31, 1996

On May 31, 1996, a further 30 second TV spot was unveiled. The video and audio
portions read:

Video

Audio

(Music Up and Under)

Hand press button to start tape recorder.

ANNCR.

Fuse lit and burns supored [sic] over video.

Good morning, Mr. Phelps.

Hands pick up Baucus photo from manila file folder marked TOP SECRET in block stencil

This is Max Baucus, liberal from Montana.

Baucus disguises his record.

Hand flips to next piece of paper with GRAPHICS (block stencil lettering): Max Baucus/Voted for 5 of the Biggest Tax Increases in American History

Baucus voted for five of the biggest tax increases in history.

Hand flips to piece of paper with GRAPHICS (block stencil lettering): Max Baucus/Voted to Raise Taxes on: Social Security/Family Farms (smaller date 0 8/6/93)

Baucus voted to raise taxes on Social Security and family farms.

Tape recorder playing.

Your mission, which may be impossible, is to get Baucus to support the majority's balanced budget plan.

Good luck, Jim.

Hand presses off button on tape recorder.

ANNCR:

(800) 332-6106

Help Jim. Call liberal Max Baucus. This message will self-destruct in one second.

(SFX - Hissing as tape dissolves)

Disclaimer

(Music Under and Out)

vii. June 21, 1996

The next NRSC television placement in Montana began to be aired on June 21, 1996.

According to the script, the audio and video portions were as follows:

Video

In his 22 long liberal years, Max Baucus has voted over 50 times to raise taxes.

Baucus even voted to raise taxes on Social Security, Medicare recipients, small businesses and the family farm.

Max, you can't hide from your record - you're definitely a liberal.

Call, tell liberal Max Baucus to support the majority's plan to balance the budget and cut our taxes.

Audio

Scrolling list of Baucus votes for more taxes.

viii. Pro-Rehberg Advertisement

The one advertisement at issue in this matter which affirmatively called for the election of Dennis Rehberg used a script read by Mr. Rehberg personally. The problem raised in the complaint was that this ad was broadcast using two different audio disclaimers, one stating: "Paid for by Montanans for Rehberg" and the other: "Paid for by National Republican Senatorial Committee."

b. Expenditures

The NRSC, in response to the Commission's subpoena, has produced memoranda, check authorization forms and copies of checks which show seven expenditures made between April 15 and July 3, 1996 wholly or in part for the production and placement of the seven NRSC advertisements discussing Senator Baucus' record which are set out above. As is detailed in the footnotes cited in the chart below, certain of these payments were included in checks for larger amounts which covered activity in more than one state or which apparently combined several Montana-related invoices received from Multi Media Services Corporation, the vendor

6140 "363" 40" 66
99 "04" 363 "0419

responsible for production and placement of most of these advertisements. In instances in which it is not clear that a payment covered more than one advertisement, the date of the second advertisement is followed by a question mark.

<u>Vendor</u>	<u>Date of Payment</u>	<u>Amount</u>	<u>Date Ad First Aired</u>
Multi Media Services Corp. (Placement)	4/11/96	\$ 9,655 ⁵	4/16/96
Multi Media Services Corp. (Placement)	4/23/96	9,637 ⁶	4/24/96
Multi Media Services Corp. (Placement)	5/8/96	80,000 ⁷	5/8/96 5/12/96 (?)
Sheliah Roy Associates (Placement)	5/20/96	65,000	5/24/96 5/31/98 (?)
Multi Media Services Corp. (Production Costs)	6/4/96	15,000 ⁸	?

⁵ This Montana-related amount was included in an April 11, 1996 check totaling \$32,800.50 made payable to Multi Media Services Corporation of Alexandria, VA.

⁶ This Montana-related amount was included in an April 21, 1996 check totaling \$32,637.50 also made payable to Multi Media.

⁷ The check covering this \$80,000, which was made payable to Multi Media, was in the amount of \$160,000 and contained the description "MN & Montana Political." In the absence of an explicit allocation between the two states, the total has been divided equally.

⁸ This \$15,000 was included in an invoice from Multi Media for \$30,000. The \$30,000 payment was made in combination with two other amounts owed to Multi Media, including the \$65,000 for placement costs also cited in the above chart, and was covered by a check in the amount of \$183,000 dated June 4. The NRSC check authorization form related to the \$30,000 figure gave as its purpose "Production for advertising to air in two states: Minnesota and Montana;" therefore, one-half of the amount has been allocated to Montana.

Multi Media Services Corp. (Placement Costs)	6/4/96	65,000 ⁹	6/7/96
Multi Media Services Corp. (Placement Costs)	6/18/96	<u>65,000</u>	6/21/96

Total \$ 309,292

All of the payments listed above represent, or were included within, expenditures which were reported as allocable between federal and non-federal activity on a 65% / 35% basis. Applying this ratio to the total of \$309,292, \$201,040 would have been paid from the NRSC's federal account(s) and \$108,252 from its non-federal account(s).

D. NRSC Response to Reason to Believe Determinations

On August 16, 1997, counsel for the NRSC submitted a response to the Commission's findings of reason to believe.

a. Pro-Rehberg Advertisement

As indicated above, one advertisement addressed in the complaint explicitly supported the candidacy of Dennis Rehberg, the eventual Republican nominee for the same office. Some stations had allegedly broadcast the latter advertisement with the disclaimer: "Paid for by the National Republican Senatorial Committee," but the NRSC had not reported an expenditure for this advertisement.

In response to the Commission's reason to believe determinations, counsel for the NRSC have stated: "Notwithstanding the disclaimer, the NRSC simply did not pay for this advertisement." (NRSC response, page 2). Counsel argue that this asserted error in the

⁹ See Footnote 8. The NRSC check authorization form for this payment shows that the full amount of \$65,000 was for the purpose of "air[ing] television in Montana over two weeks - 6/7-6/20/96."

disclaimer was occasioned by the fact that the company which produced this particular advertisement for the Rehberg Committee had prepared and distributed two versions of the advertisement, one with an NRSC disclaimer and one with a Rehberg committee disclaimer.

In support of this argument, counsel has provided an affidavit signed by Fred Davis, an employee of Strategic Perception, Inc. of Hollywood, California, the media production company retained by the Rehberg campaign. Mr. Davis' affidavit contains, inter alia, the following statements:

As is my standard practice, I produced two versions of the advertisements - one with a Rehberg Committee disclaimer and one with a National Republican Senatorial Committee disclaimer. I chose to do this to avoid inefficiencies and delay if the financing of the advertisements changed. Based on my experience in many senatorial races, I knew that if the financing of the advertisement changed, the chances were that the NRSC would be the new financing committee.

I did not prepare the NRSC disclaimer at the direction or suggestion of the NRSC. Nor did I inform the NRSC that I was preparing a version of the Rehberg Committee advertisement with the NRSC disclaimer. I did not otherwise consult, coordinate, or act in concert with the NRSC during the conception, design, production, editing, timing, finance or broadcast of the Rehberg advertisements.

In summary, counsel for the NRSC state with regard to the pro-Rehberg advertisement:

[T]he NRSC did not pay for the Rehberg campaign's radio advertisements. The sole suggestion to the contrary - the fact that one of the advertisements bore an NRSC disclaimer - was the result of radio stations mistakenly broadcasting the wrong version of the advertisement.

(NRSC response, page 4)

b. NRSC Advertisements**i. Controversial Advertising Campaign Report**

The television advertisement dated May 12, 1996 and set out above is apparently the one covered by the "Controversial Advertising Campaign Report" dated May 15, 1996 which is cited in the complaint as having been filed with KRTV of Great Falls, Montana. The original report attached to the complaint contained the statement that the advertisement was for: "The defeat of Max Baucus on his re-election campaign for 1996." The NRSC's response to the complaint, in which counsel denied that this report was submitted to the television station by the NRSC itself, included a copy of the report at issue marked "Cancel/Revise" and a replacement report which stated that the advertisement was for: "The passage of the G.O.P. Balanced Budget Proposal. Asks viewers to call Senator Baucus and support the measure."

More recently, in response to the Commission findings of reason to believe, counsel for the NRSC has asserted that the original report was prepared by the President and General Manager of KRTV with no guidance or direction from the NRSC or its media buyer." (NRSC response, page 9). In support of this assertion, the NRSC response included a "Supplemental Affidavit" signed by Dwight Sterling, president of Multi Media Services Corporation.

Mr. Sterling states:

One of the television stations with which I placed the NRSC's legislative advocacy advertisements was KRTV in Great Falls, Montana. As I later learned, KRTV prepared as "controversial advertising campaign report" regarding one of these advertisements. This report was not submitted by me or the NRSC to KRTV. Rather, the report was prepared entirely by KRTV staff. In fact, I believe the report was prepared by the President and General Manager of KRTV, William L. Preston. KRTV prepared the report with absolutely no guidance or direction from me or, to my knowledge, anyone from the NRSC.

ii. Asserted Lack of Express Advocacy or Electioneering

In their August 26, 1997 response to the Commission's findings of reason to believe, counsel for the NRSC addressed the content of advertisements which the NRSC did place in or near Montana in 1996, arguing: (1) that express advocacy is required before expenditures can be deemed covered by the provisions of 2 U.S.C. § 441a(d); (2) that the Commission's reliance upon the Court of Appeal's decision in FEC v. Colorado Republicans, 59 F. 3d 1015 (10th Cir. 1995), is misplaced because that decision was "vacated" by the Supreme Court; (3) that Commission precedent "requires that an 'electioneering message' contain express words of advocacy"; (4) that the NRSC advertisements contained neither express advocacy nor electioneering; and (5) that the advertisements at issue were legislative advocacy which "placed [them] even more squarely within the core First Amendment activity that Section 441a cannot limit." In the last regard, counsel assert that effective legislative advocacy requires that the target legislator's office be cited, and that his or her ideology and prior votes be discussed, so that viewers are motivated to take the action advocated in the advertisement, i.e., to call or write the legislator.

iii. Asserted Lack of Coordination

Counsels' second set of arguments goes to the issue of coordination. First, they question the applicability of 11 C.F.R. § 109.1(b)(4) and its regulatory definition of "[m]ade with the cooperation or with the prior consent of, or in consultation with" to the contribution and expenditure limitations established at Section 441a. This definition encompasses "[a]ny arrangement, coordination or direction by the candidate or his or her agent prior to the publication, distribution, display, or broadcast of [a] communication."

Counsel also argue that, even if this definition applies to coordinated party expenditures, the NRSC advertisements at issue "do not meet the standard of 'coordination' required by that regulation." In this regard the response cites two affidavits supplied by Mike Pieper, manager of the Rehberg campaign. The first of these affidavits, submitted in response to the complaint, stated that the NRSC advertisements "were not executed in consultation with the Rehberg Committee." The second affidavit, submitted as an attachment to the response to the Commission's reason to believe findings, states:

[T]here was absolutely no consultation between me or, to my knowledge, any member of the Rehberg Committee and the NRSC regarding any need for such advertisements. I made no requests or suggestions to the NRSC with respect to the legislative advocacy advertisements prior to their broadcast. After the advertisements were broadcast, I requested only that the NRSC send me copies of the advertisements and the documentary backup for the advertisements so that I could respond to press inquiries about the accuracy of the advertisements.

The Factual and Legal Analysis sent to the NRSC at the time of the Commission's reason to believe determinations raised a question as to the meaning of the NRSC's language that the advertisements "were not executed in consultation with the Rehberg Committee," there being a possibility that this word had been used to differentiate between production and placement of the advertisements. In their response, counsel for the NRSC state:

The NRSC did not intend the word "execution" to have such a strained, limited meaning. Lest there be any confusion, however, Mr. Pieper's supplemental affidavit makes clear that there was no consultation between the Rehberg Committee and the NRSC on the 'need' for the legislative advocacy advertisements. . . . The sole communication between the NRSC and the Rehberg Committee concerning the advertisements of which we are aware came after the advertisements were broadcast when the Rehberg Committee sought copies of the advertisements and supporting documentation so that it could respond to press inquiries about the accuracy of the advertisements.

Counsel then address at some length the appropriate basis for a presumption of coordination, arguing that not only an opportunity for an exchange of information, but also evidence of an actual exchange, is necessary in order for such a presumption to arise. In support of this proposition counsel cite Branstool, et al. v. FEC, No. 92-0284 (WBB) at 10, n. 5 (D.D.C. Apr. 4, 1995) (memorandum granting summary judgment),¹⁰ as well as Advisory Opinion 1984-30. Counsel also assert that the absence of a discussion in the NRSC's response to the complaint as to the nature and content of Dennis Rehberg's contacts with the NRSC, an absence noted in the Factual and Legal Analysis, could not give rise to a presumption of coordination.

E. NRSC Response to Subpoena for Documents and Order to Submit Written Answers

Counsel have submitted, with one exception, responses to the Commission's order to submit written answers and subpoena to produce documents.¹¹ Counsel, inter alia, identify eight NRSC staff persons who attended meetings with Dennis Rehberg or with representatives of his committee prior to his nomination to the Senate in June, 1996. These persons and their 1996 NRSC positions included Wes Anderson, field staff; Jo Anne Barnhart, political director; Phillip

¹⁰ Footnote 5 in Branstool consists of a quotation from the Statement of Reasons issued by a commissioner with regard to dismissal of an administrative complaint in the related enforcement action after a reason to believe determination and an investigation. The commissioner found there to have been an opportunity for coordination between the agents of the two respondents, but none in fact. The court found that "[t]he requirement of a finding of 'actual coordination' does . . . represent a 'sufficiently reasonable' interpretation of the statute." Branstool at 12.

¹¹ The one exception involves an interrogatory asking for the identification of all NRSC representatives who engaged in telephone or other contacts with Dennis Rehberg or representatives of his campaign in 1995 and 1996. The response termed this interrogatory "overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence." While the Commission would have a strong basis for pursuing a response, the information sought has been acquired via depositions and other means. Therefore, this Office has not recommended pursuing a substantive response to this particular interrogatory.

Griffin, field staff; Gordon Hensley, communications; John Heubusch, executive director; Priscilla Ruzzo, finance; Sonny Scot, research; and Greg Strimple, polling. The Rehberg campaign representatives named by the NRSC as persons with whom NRSC representatives met are Dennis R. Rehberg; Janice L. Rehberg; Mike Pieper, campaign manager; Tony Payton, consultant, and Ladonna Lee, consultant. As stated above, the NRSC also has produced financial and other documentation related to the advertisements at issue.

F. Rehberg Response to Subpoena for Documents and Order to Submit Written Answers

The Office of General Counsel has also received an original and an amended response to the Subpoenas and Orders sent to Rehberg for Senate and to Dennis Rehberg as witnesses. The response cited four dates for meetings by Mr. Rehberg with NRSC representatives, including ones in July and October, 1995 and in March and May, 1996. The answers name "Wes Anderson, (MT Rep. Coalitions Director); Ed Rahall, (PAC Director); Gordon Hensley, (Communications); JoAnn Barnhardt [sic], (Political Services Director); Greg Strimple, (Polling), and Priscilla Russo, (Financial Services)," as NRSC personnel with whom Mr. Rehberg was scheduled to meet in July, 1995. The response then states:

NRSC representatives may also have had contact with Tony Payton and possible Geoff Ziebart, consultants, during the October visit and with Mike Pieper, campaign manager, in May. Mr. Rehberg attempted to schedule a courtesy visit with Director John Heubusch and Political Director JoAnne Barnhardt [sic] on each of his visits and met with Senator D'Amato on at least one occasion prior to the primary, probably in July of 1995. . . . He recalls meeting with Wes Anderson, Phil Griffin-Regional Field Rep, Sheila Harrington-Field Finance Rep and two NRSC research assistants in Montana prior to the primary. Mr. Rehberg believes that JoAnne Barnhardt [sic] met with Ladonna Lee, campaign consultant, on at least one occasion in or about October of 1995. Members of the NRSC also had contact with Ashley Jordan, an employee of the Eddie Mahe Company in Washington, D.C. and Montana. During the relevant time periods, it is believed that

Ms. Jordan attended steering committee meetings at which JoAnne Barnhardt [sic] was present and met with NRSC Field staff people in Montana. Other contacts with Ms. Jordan were either by telephone or brief conversations. JoAnne Barnhardt attended various PAC Steering committee meetings which were held at the NRSC offices.

(Rehberg Response to Order, pages 6-7). This same response identifies The Eddie Mahe Company, Richardson Ziebart Consulting, and Elizabeth Bonforte, Assistant Campaign Manager, as the representatives of the Rehberg campaign who assisted with fundraising events in Washington, DC in October, 1995 and March, 1996. (Rehberg Response to Order, page 9).

The Rehberg Committee has produced documents in response to each of the requests covered by the Commission's subpoena, including, as noted above, copies of scripts of the NRSC media advertisements at issue. In almost all instances the script is part of a press release dated on or just before the first date the advertisement was aired. Each document bears a FAX number at the top, indicating that it was sent to Ladonna Lee at the Eddie Mahe Company either on the same date as the press release or later. During his deposition, Mr. Rehberg stated that the same press releases were sent to the committee itself, but that the committee did not retain them. The Rehberg Committee has also produced copies of calendars and schedules showing meetings and other contacts with representatives of the NRSC, plus Rehberg campaign events held at NRSC headquarters.

G. Depositions

As stated above, the Office of the General Counsel has deposed Dennis Rehberg, Ladonna Lee, a consultant with the Rehberg campaign, and Jo Anne Barnhart, political director of the NRSC in 1995-96, who was designated by the NRSC as the person most knowledgeable about the facts at issue in the present matter. These depositions collectively have substantiated

the fact that there were numerous contacts between Mr. Rehberg, his staff and his consultants and representatives of the NRSC prior to and after his nomination. They have revealed that certain of these contacts, particularly a meeting between Ladonna Lee and Jo Anne Barnhart in October, 1995, alerted the Rehberg campaign to the NRSC's plans to run a media advertising campaign in Montana with Senator Max Baucus as the target. The deponents all testified that there was no prior coordination with regard to specific content, timing and placement of the individual NRSC advertisements; however, the Rehberg campaign was informed of the content and timing by means of NRSC press releases containing the full texts which were issued on the same day or just prior to the first broadcast of each ad.

The depositions have also revealed that there was considerable friction between the NRSC and the Rehberg campaign over the advertisements placed in the Montana market beginning in April, 1996, especially over their content. Mr. Rehberg in fact attributes his defeat in the general election in large part to the negative content of the NRSC advertisements.

a . Background

Dennis Rehberg was Lieutenant Governor of the State of Montana at the time he was a candidate for the U.S. Senate in 1995 and 1996. He filed his Statement of Candidacy for the Senate race with the Commission on July 1, 1995. Mr. Rehberg was represented at his deposition by his wife, Janice L. Rehberg, an attorney who was also active in his 1996 campaign. At the outset of the deposition, Mr. Rehberg, in response to a question, stated that he had met with counsel for the NRSC the prior evening; later he testified that NRSC counsel had asked to represent him at the deposition, but that his wife/counsel had refused. (Rehberg Deposition, pages 9, 58).

Jo Anne Barnhart served as political director of the NRSC from February 13, 1995 to approximately January 4, 1997. She testified that one part of her job "was to provide support services to candidates and campaigns who were seeking election to office." (Barnhart Deposition, page 13). These services included advice on organization, preparation of a financial plan, press relations, and fundraising, the last of these during the post-primary period. As political director she was also responsible for supervising polling activities, for all types of research, including opposition research, for working with state party committees, and for media advertising. Arrangements for the use of NRSC facilities for candidate-sponsored events was also the political director's responsibility. (Barnhart Deposition, page 27).

Ms. Barnhart testified that in 1996 the NRSC undertook a "legislative advocacy" program which included, *inter alia*, the placement of "issue ads" in Montana.

The purpose of the program was to promote the Republican agenda The agenda of the leadership in the Congress. We would receive internal calendars from the Leader's office showing us the votes, the planned votes, or the tentative schedule that they wanted to follow in terms of bringing issues before the Senate for a vote. And so we would look at that and decide which issues we wanted to advocate, to help pass the agenda in the Congress.

(Barnhart Deposition, pages 37-38). Ms. Barnhart was the person primarily responsible for this program.

According to Ms. Barnhart, Montana was targeted to be part of this media campaign because it is a state where it is

very inexpensive . . . to run the television -- I think a week of television in Montana runs somewhere around \$27,000, give or take a few thousand, but somewhere around there. . . . And so relatively speaking, it was a very inexpensive state compared to other states.

Also, Senator Baucus was on the finance committee. He had been a supporter of welfare reform. He had, sort of, broken rank with the

Democrats on that issue. He was the only one who did, and in fact, he ended up later voting for welfare reform even on the floor.

So we thought he was the person -- we were very close on the Balanced Budget Act to getting the amount of votes that we needed. We were just one or two shy. And so we wanted to spend our money the best place we could in terms of the likelihood of convincing someone to change their mind.

(Barnhart Deposition, pages 41-42).

When asked whether the NRSC had consulted with any Republican candidates or their consultants about the content and placement of such advertising prior to the 1996 primary elections, Ms. Barnhart replied, "No." She also testified that the NRSC did not inform such candidates that these advertisements were going to be run. In response to a question as to whether the candidates were provided with scripts or videos of the advertisements prior to their airing, Ms. Barnhart stated:

Our policy, pretty much, was that after they went up, the ads went up, and they were actually on the air and running, we called the campaign, whatever campaign, and let them know. And we did that, like I say, the day -- usually the day they went up, and we probably did provide a copy of the script, although I don't remember doing it specifically.

(Barnhart Deposition, page 45).

Ladonna Y. Lee is the president of the Eddie Mahe Company, a corporate and political consulting firm. In 1995-96 the firm was hired as strategic consultants by Montanans for Rehberg. One of the firm's responsibilities was to act as liaison with the NRSC, where the principal contact for the campaign was Jo Anne Barnhart.

b. Contacts between the NRSC and Montanans for Rehberg

All three deponents were questioned about meetings which Mr. Rehberg had with NRSC representatives in July and October, 1995, and in March and May, 1996, at NRSC headquarters.

Mr. Rehberg confirmed that during his trip to Washington, DC in July, 1995 he met with Senator Alfonse D'Amato, chairman of the NRSC, for what he termed a "courtesy visit." "I had not met him. He had not met me. And, so, I was presenting myself as, at that time, the only Republican candidate for the nomination." (Rehberg Deposition, pages 29-30). Mr. Rehberg testified that during this conversation they discussed the NRSC as a potential source of assistance, but that no promises were made. (Rehberg Deposition, page 30).

During this same July, 1995 visit Mr. Rehberg also met with John Heubusch, the executive director of the NRSC. In response to a question about whether Mr. Heubusch had discussed what the NRSC could do to help, Mr. Rehberg stated:

The only promise that was ever made by the Senatorial Committee and kept was that they had the ability to contribute a certain amount of money, if I was the successful nominee.

And so that's usually what the conversation was about, because they might have wanted to make promises that they couldn't or didn't keep, but that was one they knew they could and continually made.

(Rehberg Deposition, page 32).

Mr. Rehberg testified that during the July, 1995 meeting he met Wes Anderson, who became his "contact point" with the NRSC, and Jo Anne Barnhart whom "I came to know . . . as the number two person" (Rehberg Deposition, pages 35, 37-38). Other aspects of this visit included providing background information on himself and listening to a presentation on opposition research. (Rehberg Deposition, pages 38-40). When asked if he talked with NRSC representatives about media advertising, he answered "No. Never been -- at any meeting, we didn't talk about media." (Rehberg Deposition, page 43).

Jo Anne Barnhart remembered meeting Mr. Rehberg for the first time in June or July, 1995 when he visited the NRSC offices. She testified that NRSC representatives met with many candidates or prospective candidates.

[T]his is something we did regularly for all people who were either candidates or told us they were thinking about being candidates.

We would introduce ourselves to the people. We would explain the various services that we could provide pre-primary and post-primary and just introduce them, really, to the NRSC.

(Barnhart Deposition, pages 72-73).

When asked if she remembered any specific plans for his campaign which were discussed at meetings with Mr. Rehberg at that time, she stated:

No. In fact, we wouldn't have made any promises to anyone at that point in time, because the first primary we had in that cycle was in March, and it was in Illinois.

Well, it was really more just a matter of saying, "These are the services that we provide to people; this is the kind of situation; these are the things that we're able to do in the post-primary situation."

(Barnhart Deposition, pages 75-76).

Ladonna Lee testified with regard to the July, 1995 visit that she remembered attending meetings concerning "the [opposition] research package" which the NRSC had furnished to the Rehberg campaign.

I had one meeting with Jo Anne Barnhart when she went through some of the specifics that she was anticipating the Senatorial Committee would make available.

Our primary focus, during this time frame, was that the research package that they had provided was incomplete. It didn't go through the full

voting record and other things, so we went through a seemingly endless request for them to finish that project.

(Lee Deposition, pages 25-26).

When asked if she remembered other kinds of services offered by the NRSC, Ms. Lee stated that Ms. Barnhart discussed during a telephone conversation 'the availability of support for their, for fundraising efforts.' (Lee Deposition, page 26). With regard to media advertising, Ms. Lee remembered a conversation later in 1995. (See further discussion below.)

The schedule for Mr. Rehberg's October, 1995 visit to Washington included meetings with reporters and a lobbyist at NRSC headquarters; Mr. Rehberg testified that these meetings were arranged by his own consultants, with the NRSC furnishing the space as it does for other candidates. "And, so, that's one of the services that the Senatorial Committee provides, is a place to light." (Rehberg Deposition, page 76). According to Mr. Rehberg, a meeting of his steering committee also was held at the NRSC building during this visit, but no one from the NRSC itself attended. (Rehberg Deposition, page 84).

In connection with his October, 1995 visit to Washington, Mr. Rehberg was asked if he had seen, prior to the trip, the NRSC's October 19, 1995 press release cited at page 14 above regarding plans for a 1996 media campaign targeting, among others, Senator Max Baucus. He answered, "No." Also according to Mr. Rehberg, Ms. Lee had not briefed him about the planned NRSC ad campaign. (Rehberg Deposition, pages 87, 90). He stated that he wasn't sure if he had received and/or read the press release in Montana "because we were inundated with their paper, their press releases coming out, just as the media was, and it served no purpose for us strategically or getting our work done as far as the campaign." (Rehberg Deposition, pages 90-91). Later he stated, "You asked did we ask to have Baucus included. We never did." (Rehberg

Deposition, page 92). When asked if he remembered any conversations about the NRSC media campaign during his time in their building in October, Mr. Rehberg replied, "Never." (Rehberg Deposition, page 81).

Ms. Barnhart was asked if she discussed a prospective advertising campaign with *Dennis Rehberg* when he visited the NRSC in October of 1995. Her response was "No, absolutely not. I didn't. It's not that I don't remember. I know that I didn't." (Barnhart Deposition, pages 83-84). When asked if they had discussed more generally a campaign in opposition to Senator Baucus, including the issues that might be addressed, Ms. Barnhart stated: "As I recall, most of my discussions with Dennis were about fund-raising and the fact that he really needed to raise more money than he had; . . . That was what we spent most of our time talking about."¹² (Barnhart Deposition, page 84).

Ms. Barnhart, in response to a question about other meetings with *Rehberg* campaign representatives not listed on the calendars or other documents produced by the Rehberg committee, did volunteer her memory of a meeting with Ladonna Lee in the fall of 1995. "We had lunch." When asked what they discussed, she stated:

¹² During her deposition, Ms. Barnhart was shown a copy of the NRSC press release dated October 19, 1995. The fax number of Mr. Rehberg's consultant, Ladonna Lee, was noted at the top. Ms. Barnhart stated that it was a "routine" procedure to send such a press release to a campaign representative. Later in her deposition Ms. Barnhart testified: "We had a blast-fax capability at the committee. And when we put out a press release like this, it would go out to media, probably hundreds of hundreds of media outlets across the county, as well as to the campaign."

The same kinds of things. She was a consultant to the campaign. She would tell me what a great candidate Dennis was, and just general political talk like that. It was one of those sort of friendly lunches, you know, sort of.

(Barnhart Deposition, page 115).

Ms. Lee had a rather more detailed recollection of a discussion with Ms. Barnhart in October or early November, 1995, about a potential advertising campaign. Based upon a memorandum which she prepared during the same time frame, this discussion took place at the lunch remembered by Ms. Barnhart. (See further discussion of memorandum below at page 38.) Ms. Lee recalled talking about a program which the NRSC was planning "on Mr. Baucus' voting record and votes that he was facing." This conversation followed the campaign's receipt of the NRSC's October 19, 1995 press release. When asked during her deposition if receipt of the press release triggered her conversation with Ms. Barnhart, Ms. Lee stated that "[t]his informed us that they were looking at doing [an] ad campaign, yes." (Lee Deposition, pages 53-54).

Ms. Lee testified further about her conversation with Ms. Barnhart as follows:

A. [Ms. Barnhart] said that they were willing to put \$25,000 or \$35,000, somewhere in that range, into this program.

Q. - You say "they," you mean the NRSC itself?

A. - She said the party and that they were going to share in that. There was some discussion about involvement with the Montana Republican Party as well.

Q. Did she talk about specifics as to what issues they were planning to address in that program?

A. His voting records in terms of how it was or was not in support of what Montana was, generally.

Q. Did she ask for any input from you?

A. No. They never ask for any input from us.

Q. They didn't ask for your critique as to [the] content of what they were planning to do, or ask for suggestions?

A. No. We did not see their content.

Q. What about stations they were planning to place ads with?

A. No.

Q. What about timing?

A. No.

Q. At the time that Jo Anne Barnhart told you that they were planning this ad program in Montana, did you express an opinion as to whether or not they should be doing this or ask to have any input?

A. No. I mean, in terms of opinion, obviously, any discussion of Mr. Baucus' record was not anything we were adverse to, but we did not get involved in terms of any specifics.

A. It was a very conceptual presentation by her that they were intending to do this. There were a lot of what ifs. We were a little skeptical at that point of their deliverables on a variety of things. I'm sure I processed it and didn't get too excited at the time.

Q. Did you ask for any kind of notification prior to the ads going on?

A. No.

Q. Did you ask to receive copies of the contents afterwards in a script of whatever . . . after the fact?

A. There would be no need because the Montana people, obviously, that worked with us, provided us with copies of anything that was on the air, whether it was Mr. Baucus' advertising or other campaigns. So that would never enter in my head to do since we relied on our own resource to do that.

In terms of - if you're speaking of the Senatorial campaign ads, at that time frame, [we] would also receive, as most of the political community in Washington, DC did, a press release that they disseminated both in Montana and, I assume, locally with the political newsletters here in town, copies of the ads and the press release. They would also release them.

Q. That was their policy, to send these out to all the candidates involved? Is that correct?

A. It's my understanding.

Q. It was not that you asked for it?

A. No. Fax and mail we get every day.

(Lee Deposition, pages 26-32).

Prior to her October or November, 1995 conversation with Ms. Barnhart, but after receipt of the NRSC's October 19 press release, Ms. Lee went to Montana to meet with Mr. Rehberg and his campaign staff. Upon her return to Washington, and apparently after talking with Ms. Barnhart, Ms. Lee prepared a memorandum which she termed a "recap" of the Montana campaign meeting. In this memorandum she stated that she had "met with Joanne [sic] for lunch." Under the heading "State Party" she wrote:

The party is going to undertake a message program showing MB out of touch w/Montana. Our recommendation is a series of radio ads starting ASAP telling MT that Max has already voted against their cut in taxes, reducing government, etc. The messages will then be adapted depending upon the news cycle. Jo Anne said they have \$35,000 to begin the program with and could spend over \$100,000 between now and the beginning of the year.

When asked during his deposition about this memorandum, Mr. Rehberg testified that this "was Ladonna's recommendation to me that if the state party did do this, this is what she would like to see done. The state party did not do this." (Rehberg Deposition, page 62).

Later in her deposition, Ms. Lee was asked again about her October-November conversation with Ms. Barnhart concerning a proposed advertising campaign. In response to a question as to whether Ms. Barnhart had discussed the issues to be covered in the campaign, Ms. Lee stated: "I don't recall any specific content." She also stated that Ms. Barnhart did not tell her when such a campaign would start or whether particular parts of Montana or particular stations would be involved. (Lee Deposition, pages 82-83).

Ms. Lee did recall later contacts on the subject of whether the NRSC was ever going to carry out such an advertising program, contacts which underline the Rehberg campaign's desire for this form of assistance. Her deposition continued:

Q. Were there any other discussions that you had with Jo Anne Barnhart, or anyone else at the NRSC, following those fall discussions about the ad campaign that they were planning for Montana?

A. The only other specific discussions were primarily centered around was it ever going to happen. I know that there were conversations about -- from the state party chairman of great frustration. They had been told by Jo Anne that it was going to happen. It wasn't happening. So there was discussions regarding the lack of, as opposed to any specifics. After a certain amount of months you kind of figure it was one more thing that was intended but hadn't happened.

Q. So when it finally did, were you surprised?

A. Frankly, yes.

(Lee Deposition, page 83).

As noted above, Mr. Rehberg returned to Washington in March, 1996. Asked again whether, during his meetings at NRSC headquarters on March 21st, he discussed a media campaign, Mr. Rehberg replied: "There was never a discussion of media." (Rehberg Deposition, page 106).

With regard to the same Rehberg visit to Washington in March, 1996, and whether she discussed an upcoming advertising campaign with him, Ms. Barnhart testified: "I not only have no recollection, I'm sure I didn't do that. This was -- again, on the advice of counsel, I wouldn't have done that." (Barnhart Deposition, page 88). She denied showing Mr. Rehberg any scripts or discussing potential timing with him. She then stated:

And I would like to say that I had made it very clear to my staff that these matters were not to be coordinated or discussed, shared in any way with anyone, any candidates or campaign, again, based on the advice of my legal counsel.

(Barnhart Deposition, page 89). When asked if she discussed potential campaign issues with him aside from issue ads as such, she stated that she didn't "remember anything specifically, no." (Barnhart Deposition, page 90).

Ms. Barnhart was also asked whether she recalled Mr. Rehberg's visit to NRSC headquarters on or about May 1, 1996. She stated that she remembered him stopping by "a couple of times in the pre-primary time period just to say, 'Hi, I was in town; things are going great', that kind of thing." But she stated that she could remember no specifics. "Other than just he was always very -- he's a really positive, upbeat kid. He was always telling me how well things were going." (Barnhart Deposition, page 113).

The first of the NRSC media advertisements at issue in this matter was broadcast on April 16, 1996, and thus not long after Mr. Rehberg's March visit to Washington. Ms. Barnhart was shown the NRSC press releases cited above, with their scripts for advertisements, and asked if they had been shown to or read to representatives of the Rehberg campaign prior to being aired. With regard to the April 16 advertisement she stated:

Oh, to my knowledge, in no way was this ad, the contents of this ad, shared with the Rehberg campaign prior to its running. As I explained,

we had a very strict policy on that; that was communicated to my staff, and I oversaw this process and so, no.

(Barnhart Deposition, page 96). With regard to the other scripts, Ms. Barnhart again responded "No" when asked if the Rehberg campaign would have seen them prior to their being aired.

(Barnhart Deposition, pages 109, 111).

When asked during his deposition if he had discussed possible scripts with an NRSC representative at any time, Mr. Rehberg responded: "Never."

Q. And, therefore, not prior to your visit on March the 21st to Washington?

A. Under no condition did we ever discuss media, content or ads.

Q. So you were never shown language . . . prior to airing?

A. I didn't even know the ads existed prior to airing.

Q. And that continued to be true through the whole --

A. Through the whole campaign. It became obvious to us, strategically, those ads were hurting us. We would not have wanted those ads -- we did not want those ads to be run. They obviously didn't care.

--

Q. So Ladonna Lee never saw them, either; is that correct, as far as you know?

A. I cannot answer for Ladonna. She told me there was no conversation, and I believe her, because again, I told my staff and my consultants that I wanted to have the ability, because there was the perception, I wanted to have the ability to raise my right hand and deny that there was ever any coordination on the part of myself or my consultant. They knew that.

Q. Aside from the content, did you ever discuss timing, the placement of the ads?

A. No.

Q. What stations they should go on?

A. No.

(Rehberg, pages 124-126).

As to back-up information which apparently accompanied the press releases for each advertisement and which was shown to Mr. Rehberg during his deposition, he stated:

A. . . . So, every time they ran an ad, to my knowledge, we received supporting documentation as to its accuracy, but never in advance of the ad, nor did we know the next ad was going to be on term limits. We did not know that.

We received this, then we knew they had an ad on the air. Then we could call the stations and ask them what the placements [were], how many points they bought. But we wouldn't know that until we received this. This would be our first indication --

Q. So you called the stations and got that information? You were not --

A. Fifth Avenue did. Senatorial never told us anything. Our media placement person, Bob Hoene at Fifth Avenue would call the stations and ask how many ads are running. That would give us a ballpark of what the Senatorial Committee was doing, because they wouldn't tell us.

(Rehberg Deposition, pages 127-129).

When asked whether he had seen the language of the NRSC advertisement first broadcast on May 8, 1996, prior to its being aired, Mr. Rehberg replied "No." Then he stated:

And, you know, . . . , somewhere along in here, it became obvious to us that what Max said was true, that they were cookie cutter ads, because I was told by someone, perhaps consultants, that ads like this were being run in Nebraska or Kansas with Baucus's name crossed out and incumbent whoever in that state, put in. So these were not specific to Montana, from what I was told. These were cookie cutter ads produced by the Senatorial Committee at their request without consultation.

(Rehberg Deposition, pages 134-135).

Ladonna Lee was asked about specific NRSC press releases announcing the placement of particular advertisements in April and May, 1996. She consistently stated that she had received the press releases as a matter of course, and that neither she, the Rehberg campaign nor Mr. Rehberg himself had prior knowledge of the scripts involved or of their placement. She stated: "I had no involvement with any of the NRSC ads." (Lee Deposition, page 60).

c. Relationship with the NRSC

In discussing the interaction between his campaign and the NRSC, Mr. Rehberg addressed both his own relationship with Senator D'Amato and the relationships between his consultants and NRSC staff. Relatively early in the deposition he stated:

There were conversations that occurred between my consultants and the Senatorial Committee about our race. All I'm aware of is that there was not a good working relationship between my consultants and the Senatorial Committee. It was a constant frustration to me.

They just didn't get along. And a lot of people think that's one of the reasons that - we came close, 19,000 votes, but it didn't have enough. And it was probably because of the friction that occurred, especially between Alfonse D'Amato and myself. We didn't get along at all.

(Rehberg Deposition, pages 51-52).

As stated above, Mr. Rehberg expressed strong feelings as to the effect which the NRSC advertisements had on his campaign.

Well, frankly, I think that the Senatorial Committee significantly contributed to my defeat because of their so-called issue ads. It was contrary to our strategy, the Rehberg campaign strategy. It did not help. It hurt. And, frankly, we wished that it had never occurred.

And they didn't care. They were going to do what they were going to do, it seems, whether we liked it or not. And so, there was constant friction between our consultants and the Senatorial Committee staff.

When they began running ads, it was perceived by the Montana public that I was running a negative campaign. I had no involvement. I tried to convince the media or the press in Montana I had no involvement, but the perception was there was involvement.

I ran ads of a positive nature that, frankly, D'Amato hated and let it be known in the Republican policy meetings to other Senators what an idiot I was. Other Senators came to me and said, What are you do[ing] to tick off Senator D'Amato. I said, I don't know and I don't care.

I don't know the purpose [of the NRSC ads]. It certainly wasn't to benefit the Rehberg campaign, because it did not and could not.

(Rehberg Deposition, pages 52-54).

[A]t my first debate with Senator Baucus, [after the primary] I presented a clean campaign pledge saying that any charges would be done in my voice. And I guess it was, in a way, of telling the Montana public I wanted to run a positive campaign, but in a way hoping that in memo form that everybody else would understand it. Whether it was going to be a political action committee, who was thinking about being involved but we didn't know that they were going to be, that they would abide by how we wanted to run the campaign, and the Senatorial Committee, hoping that they would see this campaign pledge that I had signed and go, oh, now we get it.

And that made him mad, D'Amato. I heard through the grapevine that he was outraged that I would sign a clean campaign pledge, that I had, in effect, tied their hands good.

(Rehberg Deposition, pages 56-57).

In one particular instance the Rehberg campaign and Ms. Lee were especially concerned about the content of an NRSC advertisement because they viewed it as "erroneous." The ad, first broadcast on April 25, 1996, asserted that Senator Baucus had voted to fund "an alpine slide and

casino in Connecticut." According to Ms. Lee, the Rehberg campaign contacted the NRSC in an attempt to have the mistake rectified. Ms. Lee's testimony in this regard was as follows:

My reaction, when we were made aware that -- I don't recall whether it was Senator Baucus' campaign or others in Montana -- the press, or whoever it was, drew attention to that fact was that this was erroneous. We were very concerned because putting out false advertising is very, very damaging. Mr. Baucus, when he did it, he did with all of the senatorial ads, he attacked Denny Rehberg for the ads, not the Senatorial Campaign Committee.

Q. What was erroneous about this ad?

A. It was drawn to our attention that the content of this ad, specifically the alpine slide in Puerto Rico and the casino in Connecticut, were things that Mr. Baucus had not voted for.

Q. Did you contact the NRSC about this ad after it came out?

A. Yes, we did.

Q. What was the conversation that you had?

A. We basically asked them what they were going to do to fix it because we were being killed by it. Mr. Baucus had attacked Denny for telling lies and for placing the responsibility of the ad on him which was not true. It was, it gave Baucus an opportunity to question Denny's integrity.

Q. What was the NRSC's response?

A. Shrugged their shoulders, so what.

Q. Who did you talk to at the NRSC?

A. Phil Griffith

Q. Was there ever any correction done?

A. Not to my knowledge.

(Lee Deposition, pages 62-63)

With regard more generally to the issues raised in the NRSC advertisements,

Mr. Rehberg stated:

I don't want to leave you with the impression that they are specific to Montana. It's just that I know that if you vote to raise taxes, a certain percentage of people in Montana are going to be very unhappy about that. And, so, that is an issue in Montana, but it is probably an issue in New Jersey. It may not be, but . --

Q. But there were others that Montanans were not that interested in, that [the NRSC] insisted upon raising; is that correct?

A. Well, the alpine slide. That's a good example of a stupid ad. Where they came up with that stuff, I don't know.

Term limits, I don't know that our polling data would have shown that *term limits was more important than spending*. But the Senatorial Committee came to that conclusion, independent of us, that term limits was an important issue, so they ran an issue ad. It must have had something to do with what was going on in Congress. I don't know, because they didn't ask our opinion.

(Rehberg Deposition, Pages 130-131)

The NRSC issued another press release on June 21, 1996 and thus following the primary election on June 4. Ms. Lee testified in this regard that the Rehberg campaign was again opposed to the content of the advertisement cited in this release. She stated:

A. This ad reflected a theme that the Senatorial Committee used a *cookie cutter approach* in several campaigns. It focused on the word liberal and tagged Max Baucus, as well as other states wherever they ran it, as liberals.

We within the campaign did not feel it was anything that was helpful because Max Baucus wasn't seen as a liberal in Montana.

Q. So you did not view this as a positive element of the campaign?

A. Again, in terms of, you know, what the Senatorial Committee was doing, we didn't think that it was anything that was believable to the voters of Montana.

(Lee Deposition, pages 78-79)

Mr. Rehberg testified that he believed he could not communicate directly with the NRSC regarding his reactions to the advertisements.

And I specifically told my staff that I want to have the ability, after the campaign, to raise my hand in the court of law and state that there was no coordination between the Rehberg campaign and the Senatorial Committee and that there will be no communication and no coordination, because I was having to fight the public perception in Montana that there was coordination. And I knew the law and I wanted to be able to say there was no coordination, and I let that be known.

I think we gave you a press response or a statement should be in this information, stating the fact that there was no coordination. We can't communicate with the Senatorial Committee about that, because even if we called them and told them not to do it, that would be a communication.

(Rehberg Deposition, pages 54-55)

Ladonna Lee was also asked about efforts to stop the NRSC's advertisements. Her responses did not deny such efforts, but instead revealed the campaign's apparently ongoing communications with the NRSC because of its need for other forms of NRSC assistance.

Q. Did you ever call Jo Anne Barnhart and say, please stop these ads completely?

A. I don't recall that specific conversation. I know that we felt very strongly that they -- that effort was allowing Baucus to continue to attack Denny because every time they put up an ad, he then would put up either advertising or press boards. United States senators can do so with great power and great communications and attack Denny for lying and being guilty.

Q. But in terms of your relationship with the NRSC, were there any requests made by Mr. Rehberg, or anyone connected with the campaign of the NRSC, to cease or [de]sist or whatever you might say?

A. Well, we had no capacity to get them to do anything. That was, you know, obviously, from the point that they wouldn't even deal with the fact that they made a mistake. They were on their own agenda. So we probably were not in a position of trying to beat a dead horse.

Q. So as far as you can remember, in terms of [a] direct relationship with the NRSC, there was no communication beyond your talk with Mr. Griffin about the earlier --

A. No. I wouldn't say there was no communication with the campaign. The Senatorial Committee is responsible to elect Republicans to the US Senate. They have resources. They control, by virtue of their promotion or detraction from your campaign, the out of state money that comes to a campaign. Control is too strong a word. They have a great impact as to whether or not people perceive your race as a winning race.

So we obviously were not going to cut off our noses to spite our face. So we had ongoing communication with them in terms of the media campaign. It had not been a fruitful relationship.

Q. Your ongoing communications were about what subjects?

A. Whatever was happening in the campaign. I mean, they do briefings, on an ongoing basis to the PAC community, to donors,. We were still, at this point, trying to get the research package that was promised for almost a year at this point.

If we were doing a PAC fundraiser or something like that, we would make them aware of it so they would support and make people aware of it.

You have an ongoing relationship because they still had not spent the coordinated expenditure on our behalf. They had the capacity to make a big impact, as they did, unfortunately, in September, when they made statements that, again, were not factual and hurt our fundraising greatly to losing the campaign.

(Lee Deposition, pages 73-76).

H. Analysis

As is set out above, the standard for determining whether party expenditures for communications should be subject to the limitations of 2 U.S.C. § 441a(d) and 2 U.S.C.

§ 441a(h) calls for the combination of a clearly identified candidate, an "electioneering message" and coordination with a candidate. Once the Section 441a(d) limitations have been reached, such expenditures count against the limitations of 2 U.S.C. § 441a.

In the present matter the RNC reported a total of \$122,000 in Section 441a(d) expenditures on behalf of Dennis Rehberg in 1996, or twice the statutory limit, apparently as a result of an assignment of the Montana Republican Party's own limit. Therefore, the NRSC had no such expenditure limitation available with regard to the Montana Senate campaign. Any NRSC expenditures found to have contained an electioneering message and a clearly identified candidate, and to have been made in coordination with a Senate candidate, would have been subject to the limitations of 2 U.S.C. § 441a(h).

a. Content of NRSC Advertisements

It is clear that advertisements paid for by the NRSC in the present matter depicted a clearly identified candidate, namely U.S. Senator Max Baucus, and contained electioneering messages regarding the campaign for the U.S. Senate in Montana in 1996. The NRSC itself had established an election-related focus, with regard at the least to planned media advertisements addressing tax increases, by issuing several months before, on October 19, 1995, a press release which set out the committee's intent to target during the 1996 elections "liberals" in Congress who had voted to raise taxes.¹³ Senator Baucus was included in the list of potential targets.

Each of the NRSC advertisements at issue contained references to Senator Baucus' position as an incumbent member of the U.S. Senate and to his record in that office; certain ones

¹³ In this press release John Heubusch, the NRSC's executive director was quoted as follows: "The Clinton admission that he raised taxes too much has undermined all of the liberals who supported the record-size tax increase. . . . We will ensure that voters know their Democrat Senator and Democrat Senate candidates 'raised taxes too much'."

referred to him as "liberal Max Baucus"; and all disparaged his positions on particular issues. They were broadcast just before the 1996 primary election in Montana and at the beginning of the general election campaign. Each of the related press releases did contain language, in its headline and in the quoted media script, that focused upon Senator Baucus' alleged past positions on term limits or a balanced budget, issues which were to come before the Senate shortly thereafter. Each one also asked listeners or viewers to contact Senator Baucus about the issue in question. However, the advertisements were placed only with stations which beamed programming into Montana and thus were aimed at potential voters, not at the broader constituencies which would have been interested in the legislative issues cited. They did not inform viewers and listeners about the timing of the Senate legislation involved. Only two provided a telephone number for Senator Baucus. And, according to the testimony of those involved in the Rehberg campaign, the advertisements were interpreted by viewers and by the Rehberg camp as negatively election-related. Thus, based upon their timing, content, placement and target audiences, it is clear that the advertisements were designed primarily to reduce support for Senator Baucus' continuation in office.¹⁴

¹⁴ The concept that pressuring an incumbent candidate on legislative issues and election-related messages are not mutually exclusive was discussed by the Commission in Advisory Opinions 1983-43 and 1984-14. In these opinions, the Commission addressed certain materials which the American Defense Committee ("ADC"), a non-profit, nonstock membership corporation, planned to make available to the general public. These materials were to contain candidates' responses to questionnaires with the responses in turn to be labeled "right" or "wrong." In addition, recipients of the materials were to be urged to contact the candidates who answered "wrong" to ask that they support the position being advocated by the ADC. AO 1983-43 stated that one such item proposed by the ADC would "refer to a congressman's 'weak voting record' and [advise] the recipient that an officeholder is 'easier to convince . . . when he's looking for votes than . . . after he's safely in office'." The opinion stated, "Because such language evinces an election-influencing purpose, the Commission concludes that expenditures

b. Coordination

As stated above, it is also necessary to find that the NRSC coordinated the expenditures for the media advertising at issue with the Rehberg campaign in order for them to be deemed limited by 2 U.S.C. § 441a(h) as in-kind contributions. The evidence gathered during the investigation in this matter, particularly that gleaned from the depositions, shows that as early as October, 1995, there was general knowledge on the parts of Dennis Rehberg, his committee and his consultants as to the NRSC's stated intent to run advertisements targeting Senator Baucus' positions on issues. The NRSC's October 19, 1995 press release announcing a planned media campaign was sent to the Rehberg campaign; it showed that the NRSC was including Senator Baucus as a potential target. Later contacts, particularly those between Ms. Lee and Ms. Barnhart, provided more opportunities for the NRSC to learn about the Rehberg committee's plans and to impart to the campaign, even if in general terms, the NRSC's plans for a media campaign addressing Senator Baucus' alleged record.

According to the testimony of both Ms. Lee and Ms. Barnhart, the two of them held a luncheon meeting in October or early November, 1995. Although Ms. Barnhart remembered only a general conversation, Ms. Lee testified that they did talk about an NRSC advertising campaign; as stated above, she remembered discussing NRSC plans for a program "on Mr. Baucus' voting record and votes that he was facing." During her deposition Ms. Lee remembered the figures of \$25,000 or \$30,000 as having been mentioned by Ms. Barnhart as potential expenditures for a Montana media campaign, that she was told the Montana Republican

(Footnote 14 continued).

for such activities are not permissible under 2 U.S.C. § 441b." Although the present matter addresses coordinated party expenditures, not corporate expenditures, the principal remains the same.

Party might also be involved, and that the focus would be on how Mr. Baucus' voting record reflected Montana. Her memorandum to the Rehberg campaign discussing this meeting with Ms. Barnhart used the figures of \$35,000 and \$100,000.

Also according to Ms. Lee's testimony, the Rehberg campaign initially believed that NRSC advertisements regarding Senator Baucus' voting record would be advantageous, although there was skepticism as to whether the NRSC would follow through with such a program. There were, again according to Ms. Lee, contacts with the NRSC regarding whether the advertisements were ever going to be aired. The evidence also shows that, while the actual advertisements which the NRSC ran in the spring of 1996 were apparently produced without input from the Rehberg campaign and were placed without the latter's prior knowledge or approval as to content, timing and target audiences, the Rehberg campaign was immediately informed of the content of the advertisements by being sent facsimiles of the NRSC's press releases which announced each ad and provided each one's content.

The advertisements as ultimately aired were viewed unfavorably by the Rehberg campaign because they were deemed to be counter to the kind of positive campaign which Dennis Rehberg wished to pursue. Communications with the NRSC nonetheless continued. Indirect efforts were made to change the tone of the overall NRSC program, particularly through Mr. Rehberg's "clean campaign pledge"; in this instance the message apparently got through to the NRSC as evidenced by reports received by Dennis Rehberg of Senator D'Amato's strong displeasure with the clean campaign pledge because he viewed it as having "tied [the NRSC's] hands good." Ms. Lee testified that she directly attempted to persuade the NRSC to correct factual mistakes in the "alpine slide" advertisement. Although her testimony was more ambiguous as to whether she ever asked that the negative content of all the NRSC advertisements

be changed - she avoided yes or no answers when questioned about such a request - , she admitted continuing other direct contacts with the NRSC after the party committee's anti-Baucus advertisements began.

All in all, the NRSC communicated to Mr. Rehberg and his committee early in his campaign the fact that the NRSC was planning a media advertising campaign targeting Senator Baucus, and received encouragement from the prospective beneficiary. The Rehberg campaign subsequently pushed the concept by making inquiries as to when such an advertising campaign would begin. Even if the level of knowledge attained by the Rehberg campaign about this program was general and theoretical prior to the airing of the advertisements, the Rehberg campaign's understanding that an NRSC media program was going to be undertaken would have been a factor in decisions made by the Rehberg campaign about uses of its own resources. The ultimately negative reaction of the Rehberg campaign to the NRSC's media advertising campaign in Montana did not erase the prior contacts which Dennis Rehberg and his representatives had had with the NRSC about the campaign in general and a media campaign in particular. Even the strong disagreements between the candidate and the NRSC over the content of the NRSC advertisements beamed into Montana, and Ms. Lee's attempts to extract an admission of factual error in one instance, show that there were both direct and indirect communications between the two committees about the NRSC's anti-Baucus media campaign. Dennis Rehberg himself recognized that any contact, even asking the NRSC not to run additional negative ads, would have equaled a form of coordination.

These media program-related contacts, be they direct or indirect, between the NRSC and the Rehberg campaign were in addition to the admitted general, ongoing relationship between the NRSC and Mr. Rehberg and his committee throughout the campaign. Thus, the NRSC's

expenditures for its media campaign against Senator Baucus constituted expenditures made in coordination with the Rehberg campaign, and consequently became in-kind contributions to that campaign subject to the limitations of 2 U.S.C. § 441a(h).

Given the facts that the NRSC made other contributions to Montanans for Rehberg in 1996 totaling \$17,500, pursuant to 2 U.S.C. § 441a(h), and that the RNC utilized the national party's and, apparently, the state party's Section 441a(d) limitations for the 1996 Montana Senate race, the full amount of the NRSC's expenditures for the media program in opposition to Senator Baucus, totaling approximately \$309,292, would have constituted excessive in-kind contributions to the Rehberg campaign in violation of 2 U.S.C. 441a(h).

c. Reporting

As stated above, the NRSC reported its expenditures for the advertisements at issue as allocable "administrative/voter drive" expenses. As is also noted above, the Commission's regulations define "administrative expenses" as including certain types of payments "except for such expenses directly attributable to a clearly identified candidate." Likewise, "generic voter drives" are defined as including activities urging the general public to register and vote and/or to support candidates of a particular party "without mentioning a specific candidate." 11 C.F.R. § 106.5(a)(2)(i) and (iv).

In the present matter the advertisements at issue discussed Senator Baucus by name. For this reason alone the NRSC's disbursements for these advertisements did not qualify as allocable expenditures and should not have been reported as such. In addition, as discussed above, the advertisements' content included an "electioneering message." In light of the direct and indirect contacts between the NRSC and the Rehberg campaign regarding the NRSC's anti-Baucus

advertising campaign, the NRSC's expenditures in this regard were reportable as coordinated party expenditures pursuant to 2 U.S.C. § 441a(d) or as in-kind contributions pursuant to 2 U.S.C. § 441a. Given the RNC's apparent exhaustion of the national party's Section 441a(d) limitation as to the Montana Senate campaign, the NRSC was left with having to report these expenditures as contributions to a candidate made pursuant to 2 U.S.C. § 441a(h).

d. Use of Non-Federal Funds

The NRSC reported at least \$309,292 in expenditures for the subject advertisements as allocable "administrative/voter drive" activity. Thus, it is apparent that non-federal funds were used to pay the portions of the expenditures allocated to non-federal activity. The NRSC's allocation formula of 65% federal / 35% non-federal would have resulted in payments from its non-federal account(s) totaling \$108,252.

The payments from the NRSC's non-federal accounts would have been made in part with contributions which exceeded the limitations set out at 2 U.S.C. § 441a and with contributions otherwise prohibited by 2 U.S.C. § 441b. In addition, the use of its non-federal accounts to make federal election-related expenditures placed the NRSC in violation of 11 C.F.R. § 102.5.

I. Summary and Recommendations

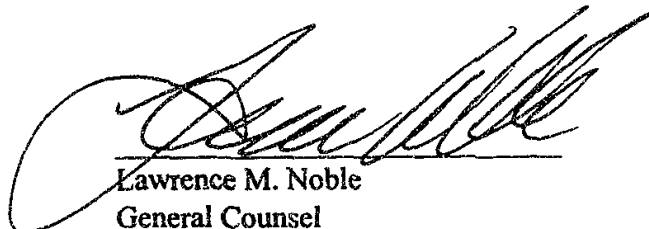
Based upon the evidence of coordination between the NRSC and Montanans for Rehberg with regard to the 1996 media campaign undertaken by the NRSC in Montana in opposition to U.S. Senator Max Baucus, and upon the content of the media campaign, this Office is prepared to recommend that the Commission find probable cause to believe that the National Republican Senatorial Committee and Stan Huckaby, as treasurer, violated 2 U.S.C. §§ 441a(h) by making excessive expenditures for purposes of influencing the 1996 U.S. Senate general election in Montana and thus excessive in-kind contributions to Montanans for Rehberg. Because the

NRSC mis-reported these expenditures as allocable expenses, this Office is also prepared to recommend that the Commission find probable cause to believe that the National Republican Senatorial Committee and Stan Huckaby, as treasurer, violated 2 U.S.C. § 434(b). Further, this Office will recommend that the Commission find probable cause to believe that the National Republican Senatorial Committee and Stan Huckaby, as treasurer, violated 2 U.S.C. §§ 441a(f) and 441b, and 11 C.F.R. § 102.5 by paying portions of the subject expenditures from its non-federal accounts.

III. GENERAL COUNSEL'S RECOMMENDATIONS

1. Find probable cause to believe that the National Republican Senatorial Committee and Stan Huckaby, as treasurer, violated 2 U.S.C. §§ 441a(h) by making excessive in-kind contributions to Montanans for Rehberg in 1996.
2. Find probable cause to believe that the National Republican Senatorial Committee and Stan Huckaby, as treasurer, violated 2 U.S. § 434(b) by mis-reporting expenditures for media advertisements aired in connection with the 1996 U.S. Senate election in Montana.
3. Find probable cause to believe that the National Republican Senatorial Committee and Stan Huckaby, as treasurer, violated 2 U.S.C. §§ 441a(f) and 441b and 11 C.F.R. § 102.5 by making expenditures in connection with the 1996 U.S. Senate election in Montana from its non-federal accounts.

11/13/98
Date


Lawrence M. Noble
General Counsel

Staff Assigned: Anne A. Weissenborn